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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 824

STELLA C. DAVIS and BETTY HORRIGAN,
Petitioners,

vs.

RAY M. FOREMAN and
THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

RAY M. FOREMAN and
THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice, and Associate Justices of the Supreme Court of the United States:

Stella C. Davis, and Betty Horrigan, petitioners, *Pro Se*, prays that a Writ of *Certiorari* issue to review the Order of the United States Court of Appeals for the Seventh Circuit entered on December 21, 1956, affirming the Orders of the District Court for the Northern District of Illinois, Eastern Division, and asserts the following:

REPORT OF OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in this Petition as follows: Petitioner's "Appendix A."

The District Court of the United States for the Northern District of Illinois, Eastern Division, being the Trial Court issued no written opinions.

JURISDICTION.

On May 28, 1956, the District Court for the Northern District of Illinois, Eastern Division entered its Order dismissing the complaint as to the Government, and on July 2, 1956, entered its Order dismissing complaint on Motion by the defendant Ray M. Foreman.

On July 12, 1956, the plaintiffs filed their Notice of Appeal, and on September 14, 1956, filed their Appendix and Brief for the Appellants in the United States Court of Appeals, Seventh Circuit. On December 21, 1956, said Court of Appeals affirmed the Orders of Dismissal of complaint, and Honorable Lindley, Circuit Judge filed his Opinion.

This petition is filed within ninety days of entry of Order on appeal, affirming dismissal of their complaint, and accordingly the jurisdiction of this Court to review the Order of the United States Court of Appeals, Seventh Circuit by a Writ of *Certiorari* is invoked under Title 28 U.S.C. section 1254 (1) & (3) see: *Nelson* v. *Lewis,* D.C. N.Y. 1935 9 F. Supp.-406, and *Mutual Life Ins. Co.* v. *Phinney, Wash.* 1900 20 S. Ct. 906-178 M. S. 327-44 Led. 1088; *McClellan* v. *Carland,* S.D. 1910, 30 S. Ct. 501, 217 U.S. 268-54 L. ed. 762; *Loewe* v. *Lawlor,* Conn. 1908-28 S. Ct. 301, 208 U.S. 274, 52 L. ed. 488, 13 ann. cas. 815.

Jurisdiction based on 28 U.S.C. 1254 "to secure uniformity of decision and to the Public Interest decided by the court of last resort. There are Federal Questions of Substance not theretofore determined by the Supreme Court of the United States and also questions to be certified by said court.

STATEMENT OF CASE.

This action was brought under the Federal Tort Claims Act, 28 U.S.C. Section 1346 (b) for judgment for damages against the respondents, Ray M. Foreman and the United States of America, due to the Conspiracy to obstruct Justice by the respondent, Ray M. Foreman, when employed as Assistant United States Attorney in Danville, Illinois, and who was contacted by the petitioner, Stella C. Davis on or about December 9, 1950 for the purpose of investigating certain purported violations of the Federal Banking Laws by some of the officials of the National Bank of Mattoon, Illinois. At that time the petitioners were seeking to ascertain the net worth of their father, William Daviditis, a long time customer and depositor of said bank and who then was sick and in his last illness.

The respondent, Ray M. Foreman, while so employed by the United States, and in pursuance of this matter, obtained certain facts and information from petitioner, Stella C. Davis which he represented would be used in making investigation regarding irregularities in the activities of some of the officials of the National Bank of Mattoon. On March 25 1951, during the time that the respondent was acting in his official capacity the petitioner's father died and the respondent, Ray M. Foreman entered into a Conspiracy with said bank officials whereby certain

assets of the petitioner's father, now deceased, were concealed and withheld from the inventories and accounts of the decedent's estate. That in addition to and in furtherance of this scheme and as a result of the information and facts obtained by the respondent, Ray M. Foreman, said respondent was instrumental in securing the appointment of the National Bank of Mattoon, Illinois as administrator, and himself as attorney for the administrator of the estate of the petitioner's deceased father.

That in fact, the respondents never filed any information or complaint against the bank or any of its officials in spite of this purported investigation and as a result of this false, fraudulent and deceitful conduct, the petitioners suffered great losses in monies, bonds, realty and other valuable assets.

Petitioners state that they had no knowledge of the above fraud before on or about November 22, 1951.

QUESTIONS PRESENTED.

This case involves an action for damages against the respondents, Ray M. Foreman, and the United States of America because of Fraud, and Conspiracy to obstruct Justice by the respondent, Ray M. Foreman, when employed as Assistant U. S. Attorney in Danville, Illinois; by the petitioners under the Federal Tort Claims Act, Title 28 U.S.C. sec. 1346(b).

The questions presented by this petition are set heretofore: Whether a Trial Court commits reversible error in dismissing Complaint and the United States Court of Appeals, Seventh Circuit affirms the dismissal when:

1. Violations of the Civil, and Constitutional Rights of the petitioners are alleged. Article 2, sec. 109 and Article XIV to the Constitution.

2. Trial Court took jurisdiction of the subject matter under a Civil Action and the Circuit Court of Appeals upheld it when allegations in the complaint are based on violations of U.S.C. 18 sections 371 and 241, 1914 and 335, violations of Federal Banking Laws, U.S.C. 12 sec. 38 "National Bank Act" Ch. 106-6-13 Stat. 101, also holding that there was no evidence of "Wilful and Wanton Conduct" on the part of respondent. "Wilful" in Act of Congress of 1882—13 U.S.C. L. 166, 22 stat.

3. The trial court and the Circuit Court of Appeals overlooked the Process Act of May 8, 1792, wherein an action at Law cannot be with one in Equity in a federal court, 28 U.S.C.—6 J.

4. Recent decisions rejecting Doctrine of Strict Construction in Statutes where the Sovereign Waives its Immunity to certain suits. The United States may be joined as a party defendant, and the Supreme Court affirmed the rule in Moore's Federal Practice (2d ed. 1948 507 *et seq.* that these actions should include all necessary parties.

5. The trial court ignored consideration of Facts and Merits of cause of action.

ARGUMENT.

I.

THE ISSUES PRESENTED SUBSTANTIALLY AND DIRECTLY AFFECTS THE CIVIL AND CONSTITUTIONAL RIGHTS AND PRIVILEGES GRANTED UNDER THE CONSTITUTION OF THE UNITED STATES AND BILL OF RIGHTS AND CONSTITUTES FEDERAL QUESTIONS OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT.

The Trial Court took jurisdiction of the Subject Matter under a Civil Action when allegations in the complaint are based on the U. S. Criminal Code 18, sec. 241, 371, 1914 and 335, also violations of the National Bank Act —ch. 106-6-13 stat. 101, 12 U.S.C. sec. 38.

The petitioners complain that on or about December 9, 1950, the respondent, Ray M. Foreman, was employed as Assistant United States' Attorney in Danville, Illinois, and held interviews with the petitioner, Stella C. Davis, in his official capacity as such, for the purpose of investigating certain purported violations of the Federal Banking Laws by some of the officials of the National Bank of Mattoon, Illinois. In U.S.C. 28 sec. 507, the Assistant U. S. Attorney derives his authority from "Acts of Congress", and not from the laws of any state and his rights and duties as an "Officer of the United States"—Article 2, sec. 109 in the Constitution—are to be collected from those Acts, *Hoeppel* v. *U. S.*, 1936, 85 Fed. 66 App. D.C. and *Levy Ct.* v. *Ringgold* Wash. 1831-5 Pet. 451 8 Led 188. It was the respondent, Ray M. Foreman's duty to attack an *"Ultra Vires"* or any other act or violation of the National Bank Act of a National Bank, because National

Banks are instrumentalities of the Federal Government created for a Public Purpose, and as such necessarily subject to the paramount authority of the United States and the government alone can attack an *"Ultra Vires"* act of a National Bank or any other violation of the National Bank Act. *Christopher* v. *Norvell,* 201 U.S. 216 S. Ct. 502, L. ed. 732, also *Logan County National Bank* v. *Townsend,* 139 U.S. 67-11, S. Ct. 496, 35 L. ed. 107.

In *Yearsley* v. *W. A. Ross Constr. Co.,* 309 U.S. 19, 60 S. Ct. 413, 84 L. ed. 554, an officer purporting to act on its behalf is liable for his Conduct causing injury to another only if he exceeds his authority or if such authority was not validly conferred on him. At that time the petitioners were seeking to ascertain the net worth of their father, William Daviditis, a long time depositor and customer of the National Bank of Mattoon, and who was then sick and in fact in his last illness.

The respondent, Ray M. Foreman, while in pursuance of this matter and so employed by the United States of America obtained information and facts from the petitioner, Stella C. Davis, which he represented would be used in making an investigation regarding irregularities in the activities of some of the officials of the National Bank of Mattoon.

A.

The Trial Court Excluded Considerations of Facts and Merits of the cause of Action relating to the acts of the respondents, National Bank Act Ch. 106-6-13 Stat. 101, U.S.C. 12, sec. 38.

Where there are issues of fact, if the slightest doubt remains, a summary judgment cannot be granted. *Kam Koon Wan* v. *E. E. Black, Ltd.,* D.C. Hawaii, 1948, 75 F. Supp. Also *Christopher* v. *Norvell,* 291 U.S. 216, S. Ct. 402, L. ed. 732.

On March 23, 1951, during the time that the respondent was acting in his official capacity, the petitioner's father died, and respondent Ray M. Foreman entered into a conspiracy with the said bank officials whereby certain assets of the petitioner's father, now deceased, were concealed and withheld from the inventories and accounts of the decedent's estate.

B.

The Trial Court ignored the U.S. Criminal Code Title 18, sections 371, 241, and 18 Stat. 335, the statutes applicable to the allegations in the complaint.

A Conspiracy to invade the rights of another person is a Grave Offense for which a jury trial is requisite. *Haas* v. *Henkel,* 1909, 30 S. Ct. 249, 216 U.S. 462, 54 L. ed. 569, 17 Ann. Cas. 1112. *Collan* v. *Wilson,* 127 U.S. 540.

In 18 Stat. 335, "An Act to protect all citizens in their civil and legal rights", respondents by their conspiracy deprived the petitioners of the equal protection of the Laws, under the 14th Amendment to the Constitution of the United States, violates the Constitutional inhibition and as he acts under the name and for the Government and is clothed with United States Power, his act is that of the government, as to Ray M. Foreman, respondent.

Due to the criminal conspiracy of the respondent, Ray M. Foreman, and the officials of the National Bank of Mattoon, Illinois, and others, petitioners were denied the right to file a claim under the Federal Tort Claims Act, 28 U.S.C. sec. 1346 (b) within the two year period because this was a Conspiracy to impede administration of Justice and to Bar Relief on the Statute of Limitations. *Harrington* v. *U.S.C.A.,* Iowa 1920, 267 F. 97; *U. S.* v. *McWilliams,* 1944 F. Supp. 791. There was no prosecution for conspiracy to impede administration of Justice.

Under 18 U.S.C. sec. 241, the "Civil Rights" of the petitioners were also violated by the above mentioned conspiracy. *U. S.* v. *Patrick,* C.C. Tenn. 1893 54 F. 338.

The Trial court took jurisdiction of the subject matter in ruling on Criminal allegations in a Civil Action, by ordering on May 28, 1956, that the complaint as to the United States be dismissed as to the Statute of Limitations under the Federal Tort Claims Act, U.S.C. 28, sec. 1346 (b).

And on July 2, 1956, the Trial Court took jurisdiction of the subject matter of a Civil Action based on Criminal allegations, and excluded consideration of Facts and Merits of the cause of action relating to all of the Acts of the respondent, Ray M. Foreman by dismissing the petitioners' complaint, for lack of jurisdiction, at claimant's costs.

Regardless of the Conspiracy to impede administration of Justice and Bar Relief on the Statutes of Limitations on The Federal Tort Claims Act, 28 U.S.C. sec. 1346 (b) the Trial Court ignored recent decisions rejecting doctrine of strict construction in statutes where the sovereign waives its immunity to certain suits.

In *U. S.* v. *Aetna Casualty & Surety Co.,* 70 S. Ct. 207, the Supreme Court affirmed the rule in Moore's Federal Practice (2d Ed. 1948) 507 *et seq.* to the effect that these actions should include all necessary parties, also in *U. S.* v. *Yellow Cab Company,* 71 S. Ct. 399 the Supreme Court affirmed. The prevailing opinion after the above rulings is that the United States may be joined as a party defendant in proceedings arising under the Federal Tort Claims Act.

II.

THE COURTS BELOW DECIDED THE FACTS AND ISSUES IN A MANNER INCONSISTENT WITH THE BASIC PRINCIPLES INVOLVING THE RIGHTS AND PRIVILEGES OF COMPLAINANTS.

A.

The Courts held as law that there was no evidence of "Wilful and Wanton" conduct on the part of the respondents.

That in addition to and in furtherance of this scheme and as the result of the information obtained by, respondent, Ray M. Foreman, said respondent was also instrumental in securing the appointment of The National Bank of Mattoon, Illinois as administrator, and himself as attorney for the administrator of the estate of the petitioner's deceased father. *Potter* v. *U. S.*, 155 U.S. 438, 15 S. Ct. 144, 39 L. ed. 214. The word "Wilful" in the Act of Congress of 1882 (22 Stat. at L. 166) Title 13 imposing a penalty on National Bank officers or agents on wilful violations of the Law, implies a knowledge and a purpose to do wrong.

In 18 U.S.C. sec. 1914—Salary of Government Officials and employees payable only by the United States, and since the respondent, Ray M. Foreman was an employee of the United States, and was instrumental in securing the National Bank of Mattoon, as administrator, and himself as attorney for the administrator of the estate of petitioner's deceased father indicates a conflict of interest on the part of the respondents, as well as violation of the petitioner's "Civil Rights" 18 U.S.C. sec. 241. This statute is broad enough to include any conspiracy for purpose of Impairing, Obstructing or Defeating the lawful functions of any department of the Government.

The respondents never filed any information or complaint against the National Bank of Mattoon, Illinois or any of its officials in spite of this purported investigation and as a result of this false, fraudulent and deceitful conduct, the petitioners suffered great losses in monies, bonds, realty and other valuable assets in the amount of Forty Thousand ($40,000.00) Dollars.

Prescott v. *Haughey* C.C. in 18956 S.F. 653 and *Stuart* v. *Staplehurst Bank*, 1899, 78 N.W. 298-57 Neb. 569, the liability of a director or official of a National Bank to a common-law action of deceit and false and fraudulent representations made by them in the pretended performance of duties imposed upon them by the National Banking Act is not precluded by the liability imposed in that law for violations of its provisions.

Osborn v. *United States Bank*—(1823) 9 Wheat. (22 U.S.) 738-6 L. ed. 204—Liability of the United States or State in Tort.

B.

The Trial Court and the Court of Appeals overlooked the rules of U. S. Code Title 28-6 J—an action at Law cannot be with one in Equity in a Federal Court.

Twist v. *Prairie Oil & Gas Co.*, 274 U.S. 684-47 S. Ct. 755. The Petitioner's complaint contains allegations of Criminal Law and Equitable Issues of Fact.

The courts of the United States are forbidden the union of Equitable and Legal cause of Action by the Process Act of May 8, 1792.

The Petitioners took advantage of new questions raised in their argument on appeal. *Assman* v. *Fleming*, C.C. Neb. 1947, 150 FRD 322.

We respectfully submit that the petitioners have been deprived of their rights under Article 2, sec. 109 of the Constitution, and Article XIV of the Constitution by the Conspiracy and Fraud perpetrated upon them by the respondent, Ray M. Foreman, who through these acts became the protector of the National Bank of Mattoon, Illinois, as attorney for the administrator instead of prosecutor of certain violations of Federal Banking Laws by some of the officials of said bank, which he represented to the petitioners, Stella C. Davis, and eventually, Betty Horrigan, that he was making investigations concerning irregularities in the activities of these officials for the purpose of prosecution.

There was a plain and manifest abuse of the discretion of the district court in allowing Orders to dismiss the petitioner's complaint as to the United States and as to the respondent, Ray M. Foreman.

CONCLUSION.

Wherefore, in the light of the foregoing, we feel that the course taken by the United States Court of Appeals for the Seventh Circuit was in error and we pray that this august body so rule, and that the Petition for Writ of *Certiorari* be granted.

Respectfully submitted,

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APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11846 SEPTEMBER TERM AND SESSION, 1956

STELLA C. DAVIS and
BETTY HORRIGAN,
Plaintiffs-Appellants,
v.
RAY M. FOREMAN and
the UNITED STATES OF AMERICA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 21, 1956

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Plaintiffs filed suit in the district court charging the United States with a tort, arising, as they say, out of the acts of Ray M. Foreman, who is averred to have conspired, with certain other persons not joined as defendants, to injure plaintiffs, in violation of the Federal Tort Claims Act, and to recover damages resulting from such violation in the sum of $40,000. Plaintiffs prayed judgment against the Government and Foreman, jointly and severally. Each defendant moved separately to dismiss the action. The court first allowed the Government's motion, and then, inasmuch as it appeared that no diversity of citizenship existed between plaintiffs

and defendant Foreman, granted the latter's motion to dismiss for lack of jurisdiction. Plaintiffs have appealed; the only question presented is whether the district court erred in entering the two orders.

A tort claim against the United States, such as the plaintiffs have asserted, under 28 U.S.C. 2401(b), is "forever barred unless action is begun within two years after such claim accrues * * *." Pertinent authority is this court's opinion in *Tinkoff* v. *United States*, 211 F. 2d 890 (CA-7). No good reason is offered to indicate that the court erred in concluding that the claim against the United States, whether well stated or not, was barred by the statute of limitations.

Defendant Foreman, who is alleged to have been an Assistant United States Attorney at the time when the asserted cause of action arose, based his motion to dismiss upon the ground that, inasmuch as the complaint showed that plaintiffs reside in the City of Chicago, Illinois, and he in Danville, Illinois, no diversity of citizenship existed to sustain the jurisdiction of the court of a suit by plaintiffs against Foreman, after suit had been dismissed as to the United States. In the absence of diversity of citizenship, the district court was without jurisdiction to proceed as to Foreman and properly dismissed the suit as to him.

The orders of dismissal are affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 824

STELLA C. DAVIS AND BETTY HORRIGAN, PETITIONERS

v.

RAY M. FOREMAN AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Northern District of Illinois (R. 8-9) is not reported. The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 1a-2a) is reported at 239 F. 2d 579.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1956. The petition for a writ of certiorari was filed on March 8, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the District Court properly granted the Government's motion to dismiss a complaint based on

the Federal Tort Claims Act which showed on its face that the alleged conspiracy was committed and discovered more than two years before the institution of suit.

STATUTE INVOLVED

28 U.S.C. 2401(b) provides in pertinent part as follows:

> A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, * * *.

STATEMENT

It is difficult to ascertain the gravamen of the complaint. It appears that petitioners charge respondent Foreman, a former Assistant United States Attorney, with conspiring with certain other persons to defraud petitioners, and further with failing to institute criminal proceedings against the National Bank of Mattoon, Illinois (R. 3-5). All that can safely be said of the complaint is that jurisdiction against the Government is based on the Federal Tort Claims Act, 28 U.S.C. 1346(b) (R. 3); the nature of the tort is more elusive.

The acts complained of were committed between December 9, 1950, and the period after March 22, 1951 (R. 3-4). The complaint further alleges that plaintiffs learned of the alleged fraud on November 22, 1951 (R. 4). However, the complaint was not filed until February 28, 1956 (R. 3). The District Court granted the Government's motion to dismiss as to it on the ground that the action was time-barred by 28 U.S.C. 2401(b), *supra*, which requires that suit be filed

within two years after the claim accrues (R. 8-9). After allowing the Government's motion, the court granted respondent Foreman's motion to dismiss, as it appeared that no diversity of citizenship existed between plaintiffs and respondent Foreman (R, 9). On appeal, the Court of Appeals for the Seventh Circuit affirmed (Pet. App. 1a-2a).

ARGUMENT

Petitioners' complaint shows on its face that the action was commenced, not only more than two years after the alleged wrongful acts occurred, but also more than two years after they were discovered. If authority is needed to sustain the plain words of the statute (*supra,* p. 2) that a suit under the Federal Tort Claims Act must be instituted within two years after the claim accrues, it may be found in *Tinkoff* v. *United States,* 211 F. 2d 890 (C.A. 7). The petition for a writ of certiorari in no wise addresses itself to this obvious bar to suit, in spite of the fact that petitioners claim to proceed under the Federal Tort Claims Act (Pet. 3, 4, 8, and 9).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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HERSHEL SHANKS,
Attorneys.

MARCH 1957.

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